

**FISH AND GAME COMMISSION
SUPPLEMENT TO STATEMENT OF EMERGENCY
ACTION**

Emergency Action to Add Section 749.3, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Longfin Smelt
(*Spirinchus thaleichthys*) During Candidacy Period

I. Need for Emergency Action for Research and Monitoring Activities:

Subsection 749.3(a)(1) Research and Monitoring

This section of the 2084 Regulation is necessary to avoid serious harm to the general welfare. If the 2084 Regulation is not adopted to include this section, the Department of Fish and Game, public entities and private parties will be deprived of critical information and knowledge regarding the longfin smelt and other imperiled species. Studies that have been going on for the last 40 years and that form the basis for critical decision making in the Delta will be put at risk if the 2084 Regulation is not approved. These studies operate on a continuous basis and rely on that predictability in coming to scientific conclusions about the data they acquire. It is critical that each year the Department track where various fish species are in the Delta system and at which life stage they are at critical times of the year. Those critical times include the period immediately following the effective date of the regulation making longfin smelt a candidate.

The conclusions from these data are used to make important environmental and policy decisions that rely on the most complete and current information. The decisions often have huge implications for the general welfare. For example, the Department is relying on being able to conduct research and monitoring studies to complete its status review of the longfin smelt to determine if listing of the species under the California Endangered Species Act (CESA) as threatened or endangered is warranted, as required by Section 2074.6 of the Fish and Game Code. Whether or not this species becomes listed will have significant implications for members of the public that rely on the Delta for water, food or business. If the 2084 Regulation is not approved, adequate evaluation and protection of longfin smelt, which are in an unprecedented state of decline, would be severely impaired, years of data would be in jeopardy of becoming ineffectual or irrelevant and the public will be disserved by decisions being made without the best possible science.

Further, the Department and other entities are under a legal mandate under the *Natural Resources Defense Council v. Kempthorne* (Kempthorne) decision to conduct various research and monitoring studies for the delta smelt, and it is certain that the bycatch of those studies will include longfin smelt. The Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) have additional duties to conduct monitoring studies per the conditions in their water right permits (Decision 1641 issued by the State Water Resources Control Board (SWRCB)). These monitoring activities include: (1) Environmental Monitoring Program (EMP) for the Sacramento-San Joaquin Delta, Suisun Bay, and San Pablo Bay, (2) Fall Midwater Trawl surveys, (3) Summer Tow Net surveys and (4) Bay studies. Without the ability to conduct this monitoring, the SWRCB can restrict State Water Project (SWP) diversions thereby further impacting all SWP water users. It is therefore imperative that the 2084 Regulation include research and monitoring among the authorized activities.

II. Need for Emergency Action for Dredging and Extraction of Sand and Gravel Resources

Subsection 749.3(a)(2) Dredging and Extraction of Sand or Gravel Resources

This section of the 2084 Regulation is necessary to avoid serious harm to the public health, safety and the general welfare. Dredging activities are utilized to clear waterways and water conveyance structures from unnecessary silt and debris. Without the 2084 Regulation in place water delivery would be burdened, and water quality would deteriorate resulting in serious harm to the public who rely on a dependable, unpolluted source of water. Additionally, dredging is often used, most notably by the Army Corps of Engineers, to clear waterways or marinas for safe ship passage. If the waterways cannot be cleared for transportation purposes, then serious harm to public safety will result as unobstructed passage cannot be guaranteed for travel or docking.

Most extraction activities involve removing sand that may be used as a component of concrete. The concrete may then be used by public and private parties to develop infrastructure and enhance transportation systems. As is evident by the wide passage of Propositions 1B¹, 1C² and 1D³ in November of 2007, the public considers improved transportation capacity and construction of roads, housing and schools (all requiring concrete) to be an important component of maintaining the general welfare of the populace.

The 2084 Regulation must include protection for dredging and sand/gravel extraction activities to avoid serious harm to public health and safety by keeping water resources moving efficiently and free of impairments, ensuring unimpaired waterways are available for transportation purposes and facilitating the production of concrete to maintain and create critical infrastructure.

III. Need for Emergency Action for Local Water Diversions:

Subsection 749.3(a)(3) Local Water Diversions

This section of the 2084 Regulation is necessary to avoid serious harm to public health and the general welfare. If the 2084 Regulation is not adopted, existing on-going activities would cease, resulting in disruption of water deliveries to private persons, businesses and local water agencies. The majority of local water diversions are used for agricultural purposes. Absent a reliable water source, most crops cannot survive. If a large percentage of the California agricultural industry cannot sustain crops, then California will be faced with a food shortage resulting in much higher food prices. The 2084 Regulation is necessary to avoid serious harm to the general welfare by maintaining a sustainable supply of affordable food. Other local water diverters include local water agencies. Absent the 2084 Regulation, these diverters must halt or reduce water delivery to customers. As discussed in Section IV below, the ability to deliver water is necessary to avoid serious harm to the public health due to lack of water for drinking and sanitation purposes.

IV. Need for Emergency Action for Central Valley Project and State Water Project Operations:

Subsection 749.3(a)(4) State Water Project and Federal Central Valley Project Export Facilities.

This section of the 2084 Regulation is necessary to avoid serious harm to public health and the general welfare. If the 2084 Regulation is not adopted, the operation of the Central Valley Project and the State Water Project (Projects), which deliver water to central valley agriculture and twenty-two million Californians in the central and southern portions of the State, would become unlawful and subject to possible injunction and other serious legal sanctions immediately upon publication of the candidacy status of longfin smelt on February 29, 2008. The twenty-two million Californians that rely on this water for drinking, sanitation, food production and other purposes may experience halted water delivery or reductions in water delivery. Further, dry conditions and high demand for water in 2007 have reduced water reserve in storage thereby limiting the ability of storage to satisfy water demand this year. DWR, the agency that operates the SWP, requested the adoption of a 2084 regulation to address these critical concerns.

¹ Proposition 1B (Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006), which was approved by 61.4% of the voters, provided \$19.9 billion in bonds to pay for construction projects for increased capacity on state highways, upgrades to local transit and intercity rail service, air quality improvement projects, and safety and security projects on public transit, railroad crossings, highways, and ports.

² Proposition 1C (Housing and Emergency Shelter Trust Fund Act of 2006), which was approved by 57.8% of the voters, provided \$2.85 billion in bonds to pay for construction of new housing in already developed areas, new apartments with some set-aside for low-income tenants, and new shelters for battered women and homeless people.

³ Proposition 1D (Kindergarten-University Public Education Facilities Bond Act of 2006), which was approved by 56.9% of the voters, provided \$10.4 billion in bonds to pay for construction of new schools, modernization of existing schools, and improved facilities at community colleges and state universities.